



August 20, 2002

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, 5th Floor
San Antonio, Texas 78205-3030

OR2002-4617

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167398.

The Bexar County Fire Marshall's Office (the "fire marshal") received a request for copies of "the annual activity report of Camelot Fire Dept. for the years 1999, 2000, and 2001 as well as a detailed activity report for Camelot Fire Dept. for the period July 26, 2000 to the present date." The requestor also seeks copies of correspondence transmitted between the fire marshal and the Camelot fire department from January 1, 2000 to December 31, 2000, as well as letters that the fire marshal and/or Carl Mixon sent to Chief Alfred Gilles during the period of January 1, 2000 through July 25, 2000. Finally, the requestor seeks copies of correspondence transmitted between the fire marshal and/or Carl Mixon and the Montgomery Area Neighborhood Association, as well as any letters/faxes that were exchanged between the fire marshal and/or Carl Mixon and Nancy Busch for a specified period of time. You state that there are no documents that are responsive to the request for the annual activity reports or detailed activity report.¹ You state that you have provided the requestor with some information. You claim, however, that the remaining requested

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

information is excepted from disclosure pursuant to section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the submitted information. We have also considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that an interested third party contends that information exists that is responsive to the request for the detailed activity report. We note that our office cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Because the fire marshal states that no such responsive information exists, we accept the fire marshal's representation.

You claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.² Information is protected from disclosure under the common-law right to privacy if it meets the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See id.* at 685. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the right of common-law privacy to the files of a sexual harassment investigation. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *See id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure.

Based on our review of your representations and the information at issue, we do not believe that *Ellen* is applicable in this instance. *Ellen* addressed the applicability of common-law privacy to information concerning investigations of sexual harassment allegations. You do not assert that the information pertains to allegations of sexual harassment. Nor does any of the information appear to be sexual harassment investigation reports.

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by the common-law right to privacy.

However, we note that in Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify the victim. See Open Records Decision No. 339 (1982); *see also Industrial Foundation*, 540 S.W.2d at 683-85. Thus, we find the identity of the alleged victim of the sexual assault noted in the information at issue is protected from disclosure under the common-law right to privacy. Accordingly, the fire marshall must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. See Open Records Decision Nos. 393 (1983), 339 (1982).

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with the constitutional right to privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. See *id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. See *id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Based on our review of the information at issue, we find that no portion of the information implicates the constitutional right to privacy of any individual noted in the submitted records. Accordingly, we conclude that the fire marshall may not withhold any portion of the information at issue from disclosure pursuant to section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

However, we note that the information contains social security numbers that may be confidential under federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). Section 552.101 also encompasses information protected from disclosure by other statutes. The fire marshall has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain these social security numbers. Therefore, we have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the fire marshall, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers at issue, the fire marshall should ensure that the numbers were not obtained and are not maintained by the fire marshall pursuant to any provision of law enacted on or after October 1, 1990.

We also note that the information at issue contains driver's license numbers that are subject to section 552.130 of the Government Code. Section 552.130 excepts information from disclosure that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the fire marshal must withhold from disclosure the Texas driver's license numbers that we have marked pursuant to section 552.130 of the Government Code.

In summary, the fire marshal must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. Social security numbers contained within the submitted information may be confidential under federal law. The fire marshal must withhold from disclosure the Texas driver's license numbers that we have marked pursuant to section 552.130 of the Government Code. The fire marshal must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

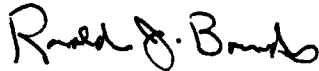
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 167398

Enc. Marked documents

cc: Ms. Cheryld L. Cordon
7806 Glen Nook
San Antonio, Texas 78239
(w/o enclosures)

Mr. Alfred Gilles
7318 Glen Haven
San Antonio, Texas 78239
(w/o enclosures)